

124
6
Supreme Court, U.S.
FILED

APR 14 2009

OFFICE OF THE CLERK

No. 08-865

IN THE
Supreme Court of the United States

CONSOLIDATION COAL CO.,

Petitioner,

v.

LEVISA COAL CO.,

Respondent.

**On Petition for Writ of Certiorari
to the Supreme Court of Virginia**

REPLY TO BRIEF IN OPPOSITION

EVERETTE G. ALLEN, JR.
VERNON E. INGE, JR.
ROBERT W. BEST
LECLAIR RYAN, P.C.
701 East Byrd Street
16th Floor
Richmond, VA 23218

PATRICK F. PHILBIN
Counsel of Record
GREGORY L. SKIDMORE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

JAMES R. CREEKMORE
THE CREEKMORE LAW FIRM PC
52 Pondview Court
Daleville, VA 24083

April 14, 2009

WILSON-EPPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

INTRODUCTION.....	1
REASONS FOR GRANTING THE WRIT.....	3
I. Consolidation Did Not Waive Its Due Process Argument.....	3
II. Consolidation Properly Raised Its Due Process Claim.	8
III. The Decision Below Does Not Rest on an Adequate and Independent State Ground.	10
IV. The Virginia Supreme Court's Decision Violated this Court's Due Process Jurisprudence.	11
CONCLUSION	12

REPLY APPENDIX

Transcript of Proceedings Before the Circuit Court of Buchanan County, Virginia (Nov. 15, 2006)

Excerpts of Opening Statement of
Consolidation Coal Co.
(Va.Rec. 249-62, 274-77, 280-88)Reply.A1

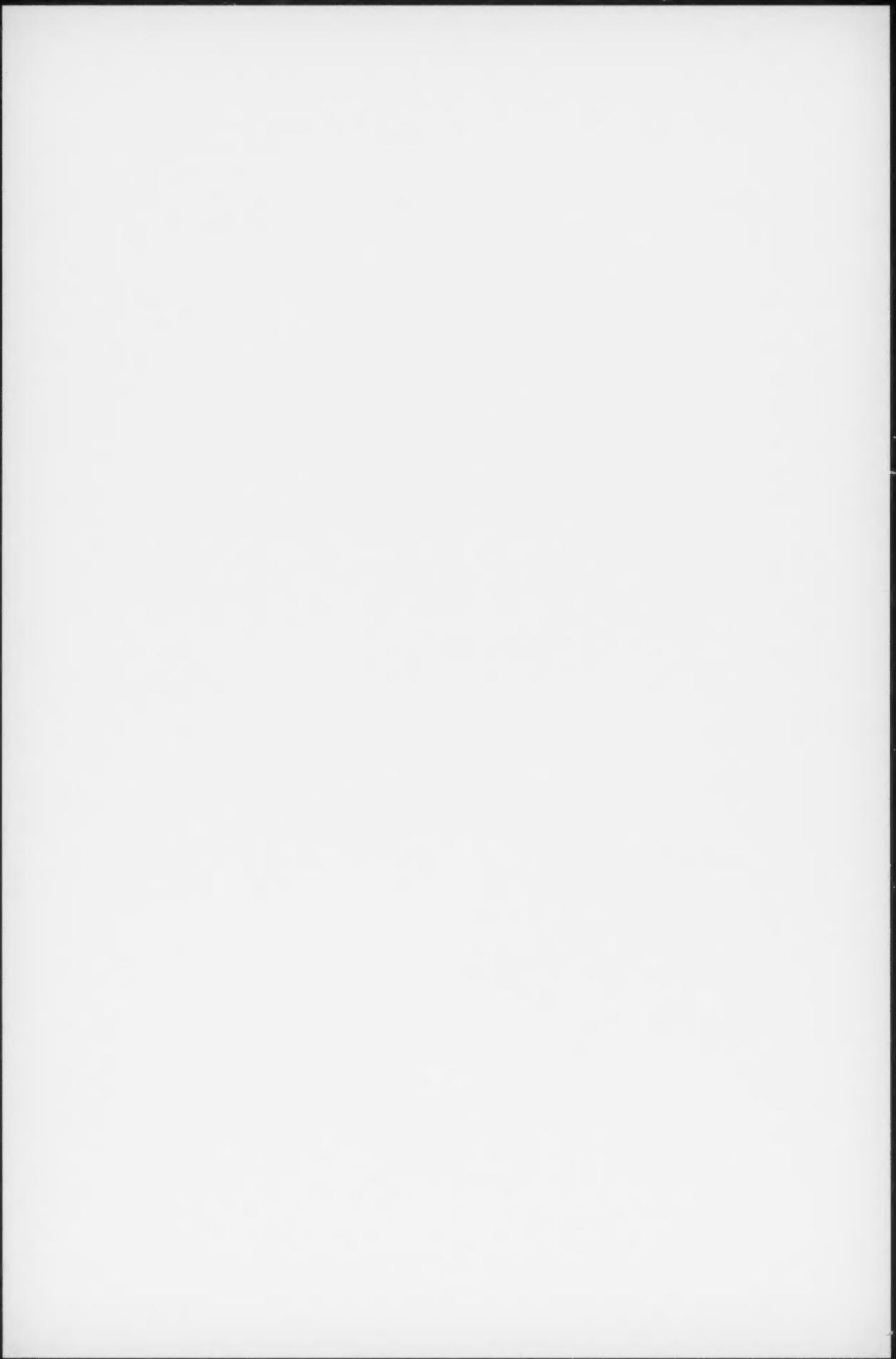
Transcript of Proceedings Before the Circuit Court of Buchanan County, Virginia (Nov. 16, 2006)

Excerpts of Testimony of John C. Irvin,
Witness for Levisa Coal Co.
(Va.Rec. 450-54)Reply.A22

- Motion to Strike by Consolidation Coal Co.
(Va. Rec. 623-26)Reply.A27
- Excerpts of Reply of Consolidation Coal Co.
to Levisa Coal Co.'s Opposition to Motion
to Strike
(Va.Rec. 650-59)Reply.A30

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Brinkerhoff-Faris Trust & Savings Co. v. Hill,</i> 281 U.S. 673 (1930).....	11, 12
<i>Delk v. Virginia State Bar,</i> 355 S.E.2d 558 (Va. 1987)	10
<i>Durham v. National Pool Equipment Co. of Va.,</i> 138 S.E.2d 55 (Va. 1964)	3
<i>Guereni Stone Co. v. P.J. Carlin Constr. Co.,</i> 240 U.S. 264 (1916).....	4
<i>Herndon v. Georgia,</i> 295 U.S. 441 (1935).....	9
<i>Richards v. Jefferson County, Ala.,</i> 517 U.S. 793 (1996).....	8
<i>Saunders v. Shaw,</i> 244 U.S. 317 (1917).....	9, 11, 12
<i>W. D. Nelson & Co. v. Taylor Heights Dev. Corp.,</i> 150 S.E.2d 142 (Va. 1966)	4
Other Authorities	
11 WILLISTON ON CONTRACTS § 33:1 (4th ed.).....	3
Va. Sup. Ct. R. 5:10	10



GLOSSARY

“Pet.”	Petition for Writ of Certiorari filed by Petitioner Consolidation Coal Co. (Dec. 16, 2008)
“Opp.”	Brief in Opposition filed by Respondent Levisa Coal Co. (Apr. 2, 2009)
“App.”	Appendix to Petition for Writ of Certiorari (Dec. 16, 2008)
“Supp.A”	Appendix to Supplemental Brief of Petitioner Consolidation Coal Co. (Feb. 19, 2009)
“2d Supp.A”	Appendix to Second Supplemental Brief of Petitioner Consolidation Coal Co. (Mar. 31, 2009)
“Reply.A”	Appendix to Reply Brief of Petitioner Consolidation Coal Co. (Apr. 14, 2009)
“Va.Rec.”	Joint Appendix in Virginia Supreme Court (relevant excerpts reprinted at App.32a–38a; Reply.A1–35).

INTRODUCTION

The central theme of Levisa's Brief in Opposition is that Consolidation supposedly told the Virginia Supreme Court that the court could definitively determine the parties' rights under the 1956 Lease and 1937 Deed without looking at any other document and that Consolidation cannot complain now if the court failed to consider the 1908 Deed and the Pobst/Combs Deed. That theory both distorts the record and misstates the law. Consolidation did argue that the 1956 Lease and the 1937 Deed are "unambiguous" and can be construed without extrinsic evidence. But that is not the same as saying that those documents could be construed without looking at prior documents in the chain of title that were incorporated by reference in the 1956 Lease and the 1937 Deed to define the rights at issue in those contracts. As a matter of law, such documents incorporated by reference are not "extrinsic evidence," and looking to them does not suggest that the 1956 Lease or 1937 Deed is ambiguous.

Levisa's central argument is thus nothing more than a sleight of hand. Indeed, every one of Levisa's numerous record citations misstates Consolidation's actual argument to the state courts. By arguing that the 1956 Lease and 1937 Deed were "unambiguous," and by objecting to Levisa's attempts to introduce extrinsic evidence (in the form of witness testimony), Consolidation was not suggesting that the 1956 Lease or 1937 Deed could be read without reference to the prior deeds. To the contrary, Consolidation expressly argued before the Virginia Supreme Court that Levisa's case failed in part because Levisa had

failed to introduce the 1908 Deed and the Pobst/Combs Deed into evidence. See *infra* pp.5-6.

Levisa's ancillary arguments are also easily dismissed. Contrary to Levisa's claim, after Consolidation *won* in the trial court, it was not required to file a cross-appeal asserting a due process error; indeed, it could not have done so because the due process error had not even occurred yet. Nor was Consolidation required to anticipate that the Virginia Supreme Court would violate due process principles by ruling against it without permitting any remand. When the court did so, Consolidation preserved its due process claim by raising it at the first opportunity — its petition for rehearing in the Virginia Supreme Court.

Levisa also errs in arguing that there is an adequate and independent state law ground for the decision below. The claim that the Virginia Supreme Court rendered two independent holdings is false. That court made only one holding: an interpretation of the 1956 Lease that depended critically on a reading of the 1937 Deed.

Finally, on the substance of Consolidation's due process claim, Levisa's attempts to distinguish this Court's prior decisions are meritless. This Court has made clear that a state court may not rule against a party without permitting that party an opportunity to put on a defense. Because the Virginia Supreme Court did exactly that, review is warranted.

REASONS FOR GRANTING THE WRIT

I. Consolidation Did Not Waive Its Due Process Argument.

Levisa's primary argument is that Consolidation cannot raise a due process claim now because the Virginia Supreme Court did "what Consolidation asked it to do." Opp. 18. According to Levisa, by arguing that the 1956 Lease and 1937 Deed were "unambiguous" and could be interpreted by the court without resort to extrinsic evidence, Consolidation was telling the court that it could definitively interpret the contracts before it without ever looking at the text of earlier documents (the Pobst/Combs Deed and the 1908 Deed) that were incorporated by reference. *See id.* at 14–17. That claim misrepresents the record and distorts basic principles of contract law.

As an initial matter, the Pobst/Combs Deed and the 1908 Deed are *not* "extrinsic evidence" or "parol evidence." Extrinsic evidence, by definition, is evidence regarding prior oral or written communications between the parties that is outside the corners of the contract. See 11 WILLISTON ON CONTRACTS § 33:1 (4th ed.); *see also Durham v. National Pool Equipment Co. of Va.*, 138 S.E.2d 55, 59 (Va. 1964).

The Pobst/Combs Deed and the 1908 Deed, in contrast, are previous deeds in the chain of title that are incorporated by reference in the 1956 Lease and the 1937 Deed. The 1956 Lease references the 1937 Deed, App.39a–40a, which in turn explicitly references the 1908 Deed, App.45a, and conveys to

Levisa "all rights, privileges, and easements . . . which were acquired" in the Pobst/Combs Deed, App.45a-46a. The operative terms of both the 1956 Lease and the 1937 Deed are thus defined by reference to the prior deeds. It is, of course, perfectly appropriate to look at other documents referenced within the four corners of a contract. See *W.D. Nelson & Co. v. Taylor Heights Dev. Corp.*, 150 S.E.2d 142, 146 (Va. 1966) ("[w]ritings referred to in a contract are construed as part of the contract" for the purpose specified and are not parol evidence); accord *Guereni Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916). Moreover, looking to such documents does not mean that the contract is ambiguous. It simply means that the court must examine all of the writings incorporated into the contract to determine the unambiguous meaning of the text.

Placing Consolidation's arguments in the context of the actual procedural history (not Levisa's distorted version) confirms that Consolidation never told the lower courts that the parties' rights could be determined definitively without looking at the Pobst/Combs Deed and the 1908 Deed.

In the trial court, Levisa moved for a preliminary injunction. In opening statements at the hearing on that motion, Consolidation anticipated arguments relating to success on the merits and argued that the 1956 Lease and 1937 Deed were "controlling" and "unambiguous." See Reply.A13-14, 17, 20. That did not remotely mean that those contracts could be interpreted without looking at the prior deeds.

At the close of Levisa's case, Consolidation decided it was unnecessary to present a full

argument on the meaning of the 1956 Lease. Instead, Consolidation moved to strike solely on the ground that Levisa had not shown irreparable harm. See Va.Rec. 624 (Reply.A27) ("Their case fails, and I will deal with just one narrow point of it, with respect to irreparable harm."); *see also id.* at 626 (Reply.A28–29); *id.* at 658–59 (Reply.A35). The trial court agreed and denied the preliminary injunction. Then, at Levisa's *request* the trial court also entered an order dismissing Levisa's claims on the merits, thereby giving Levisa an appealable order. App.31a ("[U]pon request by the Plaintiff, the Court has construed the [1956 Lease] . . .").

On appeal, Consolidation defended the decision on the record developed in the trial court. Thus, Consolidation argued that the 1956 Lease and the 1937 Deed on their faces were sufficient to prevent Levisa from succeeding on *its* case and to sustain the ruling from below. Consolidation did not argue that these documents alone could be used to determine definitively the parties' rights. To the contrary, Consolidation pointed out to the Virginia Supreme Court that Levisa could not prove its central argument because it had not put the Pobst/Combs Deed and 1908 Deed into evidence. Levisa argued that it could not have granted the right to store water in the 1956 Lease because it had never acquired that right. Consolidation explained:

[Levisa's] argument fails because Levisa did not offer any evidence to establish that it was granted any less rights than it conveyed to Island Creek. Levisa obtained its rights from the [1937] Deed . . . Levisa failed to offer the deeds conveying the coal estate to Prater

[the 1908 Deed] to prove what rights Prater had or the [Pobst/Combs] Deed to the Pobst Heirs, so as to prove what rights the Pobst Heirs had to convey to Levisa [in the 1937 Deed]. Having failed to offer those deeds, Levisa presents no factual foundation for this argument, and it fails.

Brief of Appellee Consolidation Coal, No. 070580, at 29–30 (emphasis omitted). Consolidation thus made clear that it was necessary to look at both prior deeds to interpret the 1956 Lease. Levisa's claim that "Consolidation now attempts to advance an argument that is completely at odds with what it claimed in the state courts," Opp. 16, is simply false.

Indeed, Levisa's arguments on this point are littered with misstatements or distortions.

First, Levisa repeatedly claims that Consolidation "steadfastly maintained" that the 1956 Lease and the 1937 Deed "alone decided the rights of the parties" without reference to the other deeds. Opp. 16 (emphasis in original); *see also id.* at 7, 15. Levisa provides no record citations to support these statements because there are none. Consolidation did not make such arguments.

Second, Levisa cites Consolidation's opening statement in the preliminary injunction hearing. *See, e.g.*, Opp. 6, 15 (citing Va.Rec. 249–51, 255–62, 275, 283–86 (Reply.A2–21)). But that statement merely previewed many reasons that Levisa was not entitled to preliminary relief. By citing the 1956 Lease and 1937 Deed at that point in the hearing, Consolidation was certainly not asking the court to rule definitively without looking at other documents. Indeed, on the very pages Levisa cites, Consolidation

stated that other "documents" (plural) would have to be examined:

In terms of contract interpretation I suggest to the Court that the lease and the other *documents* are clear and unambiguous and the Court can and should interpret the *documents* and I don't think extrinsic evidence is necessary or proper.

Va.Rec. 286 (Reply.A19–20) (emphasis added). Because Consolidation moved to strike at the end of Levisa's case, Consolidation never needed to show exactly which documents the court would have to examine to understand fully the 1956 Lease.¹

Third, Levisa misrepresents the record by suggesting that Consolidation "stipulated," Opp. 15, that no other documents were necessary to determine completely the parties' rights. Levisa's only citation for this proposition is Consolidation's objection when Levisa attempted to have a witness testify about the meaning of the 1956 Lease. See, e.g., Opp. 15 (citing Va.Rec. 451, 453); Opp. 5 (same). Consolidation objected that "the document is going to speak for itself and [the court] is going to make those findings." Va.Rec. 453 (Reply.A25); see also *id.* at 451 (Reply.A24). Needless to say, objecting to

¹ Similarly, Levisa points to arguments Consolidation made in reply on its motion to strike. Opp. 6 (citing Va.Rec. 652–57 (Reply.A30–35)). Again, responding to Levisa's arguments about the 1956 Lease in that context was not inviting the court to rule definitively on the parties' rights. Indeed, in making these arguments Consolidation explained that it would respond fully to Levisa's claims only "[w]hen we have a chance to prove our case." Va.Rec. 658 (Reply.A35).

witness testimony about a contract is not the same as saying that the contract can be interpreted without reading prior deeds incorporated into it.

II. Consolidation Properly Raised Its Due Process Claim.

Levisa's assertion that Consolidation did not properly preserve its due process claim is also meritless. In part, Levisa faults Consolidation for failing to raise a due process claim as "an issue of cross-error on appeal" before the Virginia Supreme Court. Opp. 26. This argument is frivolous.

At that point in the case, Consolidation could not have raised such a claim because there had been no due process violation. Consolidation *won* in the trial court. See App.30–31a. There was thus no due process error that would give rise to a cross-appeal. The due process violation did not arise until the Virginia Supreme Court ruled *against* Consolidation without permitting Consolidation any opportunity to put on its defense.²

Consolidation raised this argument at its first opportunity — its petition for rehearing to the Virginia Supreme Court. Under this Court's precedent, this was entirely proper. See, e.g., *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 797 n.3 (1996); *Herndon v. Georgia*, 295 U.S. 441, 444

² Contrary to Levisa's suggestion, Opp. 3, both the Petition and Question Presented make clear that the due process violation consists of denying Consolidation the opportunity both "to present evidence in its defense" and "to raise its affirmative defenses."

(1935); *Saunders v. Shaw*, 244 U.S. 317, 320 (1917). As explained in *Saunders*:

[W]hen the act complained of is the act of the supreme court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here.

Saunders, 244 U.S. at 320.

Levisa's only response on this point is to argue that Consolidation "plainly should have anticipated" that the Virginia Supreme Court might disagree with the trial court's interpretation of the 1956 Lease. Opp. 27. That much is true. But all that means is that the Virginia Supreme Court might have held that it was error to rule against Levisa at the close of Levisa's case (and based on the face of the 1956 Lease) and might have remanded for the trial court to entertain Consolidation's case. Levisa tries to go a step further — and goes a step too far — by suggesting that Consolidation should have anticipated that the Virginia Supreme Court would rule definitively on the meaning of the 1956 Lease "one way or another." Opp. 27. Consolidation had no reason to expect that, instead of remanding, the court would definitively interpret the lease against Consolidation based only on the one-sided record developed below. As this Court stated in *Saunders*, "[t]he defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautions in advance." 244 U.S. at 320.

Moreover, Consolidation could not simply make new arguments in the Virginia Supreme Court based on documents — the Pobst/Combs Deed and the 1908 Deed — that were not part of the record. See Va. Sup. Ct. R. 5:10 (limiting the record on appeal to, *inter alia*, “each exhibit offered in evidence . . . and initialed by the trial judge”); *Delk v. Virginia State Bar*, 355 S.E.2d 558, 560 n.2 (Va. 1987) (court may not consider documents not part of the record below).

Instead, Consolidation did exactly what it was supposed to do. It defended the trial court’s judgment on the record as it stood and assumed that, if the Virginia Supreme Court disagreed with the trial court, it would remand to permit Consolidation to present its defense. When the Virginia Supreme Court did not do this, Consolidation properly raised the due process issue on a petition for rehearing, just as the petitioner had in *Saunders*.

III. The Decision Below Does Not Rest on an Adequate and Independent State Ground.

As a last-ditch procedural argument, Levisa half-heartedly claims that the court below based its judgment “on two grounds,” only one of which is vulnerable to Consolidation’s due process claim. Opp. 10. According to Levisa, the Virginia Supreme Court issued one holding interpreting the 1937 Deed and an independent holding interpreting the 1956 Lease entirely apart from the 1937 Deed. *Id.* at 28–30. That is incorrect.

The Virginia Supreme Court made only one holding: that the 1956 Lease could not have granted Consolidation’s subsidiary (Island Creek) the right to store water in the mines at issue because Levisa did not obtain that right in the 1937 Deed. The very

passages in the opinion Levisa cites for a supposed alternative holding show only one holding, entirely dependent on the 1937 Deed:

Thus, Levisa Coal maintains that it did not obtain the right under the 1937 deed to support mining operations on other lands by permitting the inundation of the subsurface area with wastewater. Accordingly, Island Creek Coal could not have obtained the right to do so within its leasehold because the 1956 lease expressly limited the easements Levisa Coal granted to Island Creek Coal "to such rights as [Levisa Coal] owns and has the right to lease." We agree with Levisa Coal.

App.19a (cited at Opp. 10). The court reiterated its holding later in the opinion: "Since the 1937 deed conveyed no right to use any portion of the mineral estate to support mining operations on other lands, the 1956 Lease could not have granted such right . . ." App.22a (cited at Opp. 29). The only other citation Levisa provides is to a passing description of the 1956 Lease in the "Background" section of the opinion. See Opp. 29 (citing App.4a). That is plainly not a holding.

IV. The Virginia Supreme Court's Decision Violated this Court's Due Process Jurisprudence.

Levisa's arguments on the substance of the due process issue are also meritless. Levisa tries to distinguish *Saunders v. Shaw*, 244 U.S. 317 (1917), and *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930), on the theory that those cases involved a party who was "genuinely surprised" by a change in the law. Opp. 21–23. It is true that the

cases involved a change in the law, and perhaps surprise, but neither factor was relevant to the due process question.

The change in the law is what prompted the lower court in each case to rule suddenly against the petitioner without allowing the petitioner a chance to put on its case. See *Saunders*, 244 U.S. at 318-19; *Brinkehoff-Faris*, 281 U.S. at 678. The due process violation, however, turned solely on the fact that the court ruled against the petitioner "without giving him a chance to put his evidence in." *Saunders*, 244 U.S. at 319; accord *Brinkerhoff-Faris*, 281 U.S. at 678. That is precisely what the Virginia Supreme Court did here by ruling against Consolidation before allowing it to present its defense. There is no meaningful distinction between the ruling held to violate the Due Process Clause in *Saunders* and the Virginia Supreme Court's ruling here.

CONCLUSION

The Court should grant the petition for a writ of certiorari and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

EVERETTE G. ALLEN, JR.
VERNON E. INGE, JR.
ROBERT W. BEST
LECLAIR RYAN, P.C.
701 East Byrd Street
16th Floor
Richmond, VA 23218

PATRICK F. PHILBIN
Counsel of Record
GREGORY L. SKIDMORE
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

JAMES R. CREEKMORE
THE CREEKMORE LAW FIRM PC
52 Pondview Court
Daleville, VA 24083

APPENDIX

REPLY APPENDIX
TABLE OF CONTENTS

Transcript of Proceedings Before the Circuit Court of
Buchanan County, Virginia (Nov. 15, 2006)

Excerpts of Opening Statement of
Consolidation Coal Co.
(Va.Rec. 249–62, 274–77, 280–88) Reply.A1

Transcript of Proceedings Before the Circuit Court of
Buchanan County, Virginia (Nov. 16, 2006)

Excerpts of Testimony of John C. Irvin,
Witness for Levisa Coal Co.
(Va.Rec. 450–54) Reply.A22

Motion to Strike by Consolidation Coal Co.
(Va.Rec. 623–26) Reply.A27

Excerpts of Reply of Consolidation Coal Co.
to Levisa Coal Co.'s Opposition to Motion
to Strike
(Va.Rec. 650–59) Reply.A30

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BUCHANAN

*LEVISA COAL
COMPANY, a Virginia
Limited Partnership and
L.L.P.,*

Plaintiff : Case No.
CL06000408-00

--VS--

*CONSOLIDATION COAL
COMPANY,*

Defendant :

November 15, 2006
9:00 a.m.

HEARD BEFORE:
THE HONORABLE KEARY R. WILLIAMS

Reply.A2

[p.249]

* * *

MR. ALLEN: Good morning, your Honor. I apologize in advance because my statement is going to be somewhat longer than Mr. Street's because I -- it is not as simple as Mr. Street has said, and I don't think he stated the facts exactly. Your Honor, Consolidation Coal Company Inc., is the named defendant here. Island Creek Coal Company, as he referenced, is the wholly-owned subsidiary of Consolidation. They are both members of the family of Consol Energy, Inc.

Levisa says that Consolidation is storing the water. It is not. Island Creek is storing the water pursuant to the 1956 coal lease. The failure to plead facts that are important doesn't [p.250] make them go away and it doesn't change the facts. I will tell you, your Honor, this case is about money and I think hopefully when I finish my statement, and as you hear the evidence, you will see that it is about money more or less, nothing more and nothing less.

What Levisa's motion seeks to do, if granted, is it will shut down the mechanics of this mine. We admit Levisa has excess water and excess water has to be disposed of and the affect of granting this motion will shut down Levisa. Buchanan No. 1 mine is one of the largest mines in the country and one of Buchanan County's largest employer and sources of revenue.

Reply.A3

As a damage claim, which is really what this is, what Levisa attempts to do is to force Consolidation to pay now -- or Island Creek to pay now for coal or gas reserves that may or may not ever be produced in the future.

And, your Honor, several simple facts are pertinent in the 1956 coal lease. What Levisa asks the Court to do is really ignore the 1956 coal lease with Island Creek and, your Honor, that lease specifically granted Island Creek certain [p.251] rights.

First, it granted the right to dump water without regard to the source of that water and without regard to the lessor having to give any consent.

Secondly, your Honor, it granted this right and it is important enough that I would like to read it. I won't read many things. "Generally to make any use of the lease premises which lessee may deem needful or convenient in carrying on its mining or other operations." And, your Honor, there are no restrictions and there are no limitations on either the specific right to dump water or on the general right to use the property in any way needful or convenient to other operations.

I would like to take a moment and give you the relationship between Consolidation and Island. Prior to 1983 they were independent, separate companies that cooperated with each other in the mining and lease of the area. Through subleases Consolidation mined certain of Island Creek's

Reply.A4

leaseholders, and that was done through more effectively, efficiently and economically mining [p.252] the coal mines in Buchanan County.

That resulted in more money, more royalties, millions of dollars of royalties being paid to the landholders in Buchanan County, and it was a benefit to the companies themselves in terms of being able to these keep [sic] miners on and boost the economy.

In 1993 Island Creek was acquired by Consol Energy Inc. and it became -- which is Consolidation's parent -- and subsequently Island Creek became, and is now a wholly-owned subsidiary of Consolidation.

In 1993 -- this storing of excess water in Island mines is not a new creation -- in 1993 these two companies, Island Creek and Consolidation, recognized the need to deal with the excess water being produced by their respectively held estates. They agreed as to how they would handle that. That agreement was for the excess water to be temporarily stored in idle mines and later removed, and I emphasize temporarily stored and later removed.

As applicable here, Judge Williams, Island Creek will move the water from Buchanan to VP 3 at [p.253] its expense. Consolidation has the responsibility to remove that water from VP 3 to the Levisa River pursuant to the standard by the DMME. Because of Consolidation's expertise in

Reply.A5

terms of movement, storage, discharge of water, Consolidation has the administrative and functional responsibility to do this. In fact, Island Creek will bear -- the lessee will bear the cost of moving water to VP 3 and Consolidation will bear the cost of moving it to the Levisa River.

These agreements were oral in the beginning but are now memorialized by two contracts. One in March of '03 and the other in January of '03 that spell out the situation and spell out the obligations of the parties. And it is this arrangement that Levisa seeks to temporarily enjoin, specifically Island Creek's storage, temporary storage of the water in VP 3.

And as that relationship is Island's -- it is Island Creek that has the right to store the water -- it has entered into a contract with Consolidation and for the storage of the excess water from Buchanan and there is nothing wrong with that. And they are aware of that. The idea [p.254] that Consolidation is just a stranger and we don't know anything about that. They know about these contracts and certainly they know about the lease.

I would like to talk to you a little bit about the lease because they obviously disagree about that. Levisa says the water stored in VP 3 causes injury to the remaining coal in VP 3 and they have a loss of coal-bed methane gas. However, Levisa only has an interest in the coal estate and its rights now released

Reply.A6

with respect to the coal estate are clearly governed by the 1956 lease.

Levisa has no ownership interest whatsoever. As you read the complaint you don't see how it says to the Court or anybody else how it gets its gas interest. It just says we have gas interest [sic]. The truth is Levisa had and hasn't had absolutely no interest, no ownership interest in the gas estate.

And two points should be made here. Levisa's sole rights with respect to the gas estate arise out of two royalty agreements between Levisa and the owners of the gas estate. Once the gas is extracted and sold, clearly and plainly its [p.255] only right there is to money damages.

Moreover, in the 1956 coal lease between Levisa and Island Creek there was [sic] the partners -- Levisa at the time -- expressly agreed that that lease, the coal lease, was subject only to gas leases outstanding on that date. There was no gas lease outstanding on that date. And in fact there was no gas lease until 1989, 33 years after the coal lease. The result to that is that Island Creek's right to VP 3 are superior to Levisa's rights with respect to the gas estate to receive any gas royalties.

I will talk a little bit about the coal estate and what has happened specifically in response to some of the things, and directing it specifically at VP 3. Island Creek mined VP 3 from 1968 until 1998. And in 1998 VP 3 idled.

Reply.A7

Now, important, your Honor, Levisa does not assert -- here is what it doesn't assert -- it doesn't assert that it is wrong to have idled VP 3 in 1998. It doesn't assert that it would be economically feasible to reopen and recommence mining in VP 3 now or at any other time in the future, and it does assert that the coal lease has [p.256] been terminated.

So the claim that Levisa has with the respect to coal is neither irreparable or even damages because it is pure speculation. Why is it pure speculation? If the economic situation never improves to the point where it is economically feasible to reopen VP 3 then it doesn't matter what happens to the coal because it is simply uneconomical to reopen the mine.

So when Mr. Street stands here and tells you that that is a valuable asset and it is definitely being destroyed, the only way it has got any value is if it becomes to VP 3 to open VP 3 in the future. The point is that VP 3, through no one's fault, may never be opened and if so there is no harm to Levisa either irreparable or even in money damages.

What this means is that Levisa cannot meet the threshold burden of showing irreparable harm. The standards claim is entirely speculative and further any damages it might sustain are clearly compensable in money damages at a future date.

There are two other criteria and irreparable harm is the threshold of this case. [p.257] Just to touch upon the three other factors, and our evidence will show this and I will speak briefly to it, the

Reply.A8

comparative loss to Consolidation would be, if the injunction is granted, is not only enormous but it is far greater than any comparable Levisa.

Third, the likelihood of Levisa's prevailing merits cannot be shown by them. And lastly, the harm to the public interest in the form of the repercussions to the community, to the people that work at the mines, to the vendors who are dependent upon the mines is enormous as well, and a factor that Mr. Street didn't mention in his opening argument.

I would like to give you an overview of the facts as the documents purport them to be, and as the witnesses will show. I want to go into some detail because of the critical nature of this hearing.

First, the operative agreements. The first operative agreement is a 1937 deed from Claude Post [sic] in a -- it is a 1937 deed which transferred to Levisa the coal estate. That conveyance was for "All coal, metals and timber together with all [p.258] rights, privileges, and easements incident thereto." Your Honor, that grant constitutes the entirety of Levisa's interest of the gas estate and in fact it constitutes the entirety of its interest in the entire estate.

Then you go to 1956 lease. This is Levisa's 1956 lease with Island Coal and since it truly is the governing document in this dispute, that Mr. Street talked about, it is the governing, controlling document as far as rights of Consolidation is concerned and I would like to point out certain --

Reply.A9

First, Levisa leased to Island Creek the sole exclusive right to remove the coal. In addition, Island Creek was specifically granted, as mentioned earlier, the right to dump water or refuse by Consol. That is on page three of the lease.

I should add here that in article eight of the lease the location of dumps or disposal of refuse and waste material need to be approved by the lessor, but the lessor's consent is actually not needed for the location of any dumps. They distinguish the right to dump water and waste in [p.259] one place absolute and in another place qualified by the lessor's consent, but the right to dump water is not qualified. That is not in existence.

Importantly, with respect to a temporary injunction, Island Creek, and again the general, and I will just say general since it the most important from the standpoint of Island Creek, is granted the right generally to make any use of the lease premises that the lessee may deem needful or convenient in carrying on its mining operations. Obviously, the language is broad without any restrictions of the notation whatsoever.

Since this is a temporary injunction there are two provisions in the lease that mitigate against -- and we would suggest that it has to be a damages case. First, article two of the lease says that the tangible royalties on unmined coal in place -- and this is what Levisa bases its claim on -- shall be based on the fair

Reply.A10

market value at the time such coal should have been mined.

Sometimes these leases are hard to read and hard for me to read because I haven't read many before. But what it is saying is that if the [p.260] lessee has got unmined coal, as stated in the lease here, that what the lessor is entitled to is he doesn't have to wait for that coal to be mined. He can come in and demonstrate that it should have been mined and in demonstrating that, he is entitled to make a recovery.

Not them, but he is entitled to make a recovery at the time -- excuse me, I am wrong -- he is entitled to make a recovery as of the time the coal should have been mined, and he has, obviously, the burden to prove that. He has to come before you. He has to show the coal is minable and he has to show that they should have done it and if he can show that, then he is entitled to be paid the fair market value. What it is clearly designed to do is provide a damage remedy for a lessor.

In addition, there is specifically a liquidated damage clause in this particular case. Article 11 and it says -- I promise you this will be the last thing I read to you -- "Parties to the coal needs [sic] to also agree that if at any time lessee shall not conduct its operation on leased premises as provided in the lease, and loss of [p.261] coal or other damage to the lessor thereby resulting or is threatened, lessee shall pay to lessor the full amount of royalty on the

Reply.A11

estimated tonnage of coal lost or that may be unmined in the leased premises or at least it was a failure of lessee to conduct its operations." And here is a catchall, "And shall compensate lessor for the full amount of any damage that the lessor shall sustain."

What Levisa's remedy is, and Consol's is, is money damages and what the lease does is provide that they take [sic] cannot terminate the lease or enjoin Island Creek from its mining or other operations.

Let's talk about the gas lease. This is in -- excuse me -- this is in the coal lease. The coal lease specifically said -- the 1956 coal lease -- that it is expressly subject to all gas leases outstanding as of that date. There were none. The 1956 lease is not subject to the gas lease pursuant to which Levisa claims. In short, the coal lease is senior and the gas lease is the -- and that is a result that Levisa agreed to in 1956.

[p.262] Your Honor, the next document is an August 1989 gas lease. In this document Levisa and the folks at Combs' heirs executed what is called an oil, gas, and C.B. lease to a firm called Oxy U.S.A. leasing the gas estate to Oxy. I am not sure why Levisa is shown as a lessor on this lease because it clearly had no rights with respect to the gas. I suspect, and I will tell you this is just a suspicion, that Oxy knew that Levisa has the coal estate and perhaps out of some concern that coal-bed methane

went with the coal estate and made Levisa join in that lease.

But the simple fact is there is no document -- if it is, I would be surprised -- that shows Levisa had an ounce of interest, ownership interest in the gas estate. So they own it and their sole right is after this lease to Oxy then the Post [sic] and Combs' heirs entered into an agreement with Levisa and they only got those royalties, money -- the payment of money upon the contraction and the sale of the gas estate.

* * *

[p.274] Your Honor, the harm to Consolidation, if the injunction is granted, is enormous because you can't mine VP 3 unless you can move the excess water and they know that. If an injunction is granted Consolidation must begin immediately the process of idling that mine because of the water going into the Levisa. I don't want to bore you with the details, but they would have to start right away.

Buchanan is one of -- Buchanan 1 is one of Consolidation's most productive mines, one of the 20 largest underground mines in the United States. Consolidation has contracts with customers for the sale of that particular coal. They depend on it for a steady supply worldwide. If this coal is constrained and any extended shutdown of Buchanan will have a serious impact on this.

}

Reply.A13

Buchanan employs -- the Buchanan mine employs more than 400 people with an annual payroll and benefits of nearly 30 million dollars; the buying and purchase of goods and services in excess of 60 million dollars, mostly from local vendors in and around Buchanan County. They are dependent on the mine for their livelihood. It is [p.275] expected to pay in 2006 in excess of 36 million dollars in taxes. One point six million will be paid to the county as well as an excess of a hundred thousand dollars to local charities. Most of its employees reside in Buchanan County.

The point is, your Honor, the harm to Consolidation is so beneficial that any benefit that Levisa would gain as a result of a temporary injunction is that it should be denied on that basis as well.

The same is true with respect to the bond. I am not going to bore you with bond requirements but the desire to grant the temporary injunction, we have evidence with respect to the bond and I will just say it is pretty substantial and the evidence will show we are entitled to a bond in excess of 600 million dollars.

I want to run through and apply the facts. What I have given you is the facts as they will dominate and they will dominate at this hearing and they will be proved in the hearing. So applying the documents will speak for themselves. The documents are

controlling. As much as I think Levisa might want to move away from the documents, [p.276] they are.

Your Honor, the basic -- so to apply those facts to the law, the basic statutes in granting an injunction shall be granted unless your Honor is satisfied with plaintiff's equity. While the Virginia Supreme Court has not set forth a specific case for this, Circuit Courts in Virginia have basically followed the Fourth Circuit on four factors.

And these factors all appear in piecemeal fashion in the Virginia Supreme Court decisions, but it is pretty clear -- at least it is pretty clear to me, that I think they control how your Honor should look at these. And they are: The likelihood of irreparable harm to Levisa if you deny the injunction; the likelihood of harm to the defendant, Consolidation, if you grant it; the likelihood that Levisa would succeed on merits; and the public.

For starters, Levisa cannot show irreparable harm as an extraordinary remedy to be granted sparingly and only in the limited circumstances. They are clearly without, particularly, your Honor, where the Court has to [p.277] act on an incomplete record.

The Courts have insisted that the plaintiff prove irreparable harm. While there are innumerable Virginia decisions extended on point, I found a simple statement from the United States Supreme Court that impressed me. Obviously, it impressed me because it seemed to be a good one, but here is

what it said for the Court establishes and the key word in this consideration is irrelevant.

"Mere injuries, however substantial in terms of money, time, and energy necessarily expended in the absence of the possibility that adequate compensation or other correct remedy will be available at a later date in the ordinary course of litigation weighs heavily against any kind of irreparable harm." And the case is Samson -- 415 U.S. 61.

Your Honor, first Levisa alleged harm. It is speculative and there are numerous reasons as to why it is speculative. They have to show that their harm is eminent and they can't show that.

* * *

[p.280]

Adequate remedy for irreparable harm. The rule of law says when you harm something and you are compensated by money damages the Court should refuse to find the harm irreparable. Even assuming, your Honor, that the water does cut into [p.281] the coal and gas reserves, the entry is greatly quantifiable and addressed by damages.

Coal and gas are commodities. They are quantifiable. They can be valued and reduced to money damages assuming the -- with our expert. Specifically the amount of coal reserves in VP 3 today is known and quantifiable. If water damages

Reply.A16

the coal that will be learned if and when the coal is removed from the mine, and if that occurs the damages can be dealt with.

Indeed, you Honor, the parties have already considered it and provided this contingency and we seek -- by providing for damages. Specifically it provides that if the coal is not mined or it is threatened, then it can be calculated and royalties are paying for the lost revenue.

It says -- it goes further, the lessor is compensated for any other damages suffered. By the way, the lease also provides the lien to Levisa to insure that they get paid on the leaseholder estate as well as on other properties.

If Levisa asserts -- another thing they could assert because I am not sure it is going to [p.282] be asserted because the plaintiff doesn't speak to it, but they assert the water will increase the cost of reopening of the mine. That convenience. It is real easy. When the comes time [sic] to reopen the mine, they can come in and say they have been trying to charge us with respect to the cost of reopening the mine and your Honor can address that. If they try to deduct or add on as an expense the cost of removing the water your Honor can deal with that at another time.

Gas, with respect to the gas the VP wells have been in production for years. The gas reserves are quantifiable. The production data is well-known in these wells and if these wells lessen or stop

producing then Levisa will be able to calculate its damages.

The point is, it is about money and it is not about an injunction. I have spoken to the injunction issue that Consolidation will suffer a great disproportion of harm. And, your Honor, there is a play between the disproportion of harm and the likelihood. If the harm to the defendant is much more disproportionate if the injunction is granted than the harm to the plaintiff if it is [p.283] denied, then the plaintiff has to show a greater likelihood. And this is -- they will not -- they will not be able to do that.

The likelihood of a success story. This is the very fact I almost decided to reverse it, and make it the first because Levisa cannot show it is likely in the lease. The '56 lease is the controlling document between these parties. They ignored it and that is the reason they have sued just Consolidation.

We filed an initial motion -- when the initial motion was filed the judgment said Island Creek was a necessary party, which it is. They don't really want Island Creek in here but it seems that they do want Consolidation to help them out and be able to reserve the rights of the lease which is of course not so.

Levisa has not pleaded theory for its claim. You heard Mr. Street talk about trespass but you won't find trespass in the claim and I will tell you why in a minute. A plain reading of the lease, if you read the 20 some pages, but it has two primary points.

The first is that for Levisa has always [sic] [p.284] mined in connection with the coal removal, removed from the property-consistent with reasonable and proper expectations. For Island Creek the right to remove that coal unimportantly but generally the right to make any use of the lease premises either in the carrying on of its other operations, not just its mining, but its other operations. No restrictions, no anything.

And I suggest, your Honor, that Levisa is ignoring the lease's recognition, that they lose once the lease comes into play.

Let me deal with something simple that I sort of started with. Levisa references in its complaint, and Mr. Street mentioned it, about mining activities. Construction and passes made and shafts and access ways in the voids and I would like to speak to those because there are some interesting cases about voids. I think, your Honor, has decided some and I look at the lease and the void and the storage of water.

Island Creek mined the property for 30 years and in the process of it obviously these passageways and voids were created and exist. So who has the right to utilize these voids? Well, [p.285] the lease is in effect, still in effect. In fact it was renewed in 2001 and goes for another 20 years until 2021, and no allegation has been made, your Honor, that Island Creek has breached the lease.

Reply.A19

I would suggest, your Honor, and I believe case law supports this, and the lease, that clearly Island Creek has the right to use these voids and the storage of water is not an improper, illegal wrong or in any way -- and I think this is important -- prohibited by the lease.

If Levisa had wanted to prevent Island Creek from storing the water in the mine voids from any place else and I would submit that under plain language of the lease, that Island Creek has the right to dump water and to make use of the property generally as it may be needful and to its operations; and part of its operations is its agreement with Consolidation to store the water.

This is not to deprive Levisa of its ownership interest in the voids, but that ownership issue is subordinate and the lease is very clear that they can't exercise their rights in any way to -- or on derogation of the coal [p.286] lease.

I will just comment briefly about a Supreme Court case, your Honor. It is the Stone Gap Collier versus -- case 1913, Supreme Court decision. It made clear that a lessee of real property has the right to use that leaseholder's property -- not only to carry on all purposes customary and expected in connection with its business of the property but also for any purposes not prohibited by the lease.

Here the lease didn't say anything about preventing the lessee from storing water and granted in addition specific rights. In terms of

contract interpretation I suggest to the Court that the lease and the other documents are clear and unambiguous and the Court can and should interpret the documents and I don't think extrinsic evidence is necessary or proper. And those leases are before you and can be taken by this plaintiff.

In the case of the following [sic] the Supreme Court's decision it was pointed out that the lease the sentence: "Any uncertainty from the language of the lease is to be construed strongly [p.287] against the grantor. And the facts and circumstances of its execution may be examined in any of/and not to vary this grant." And, your Honor, the grantor is Levisa. And the reason for that is that the lessor, here Levisa, is really in control. It has the control of the lease. It doesn't have to do that and so it can, let's just say, set the table and call the terms and it did here.

I have covered -- I am going to cover again the gas estate. I think the important point there is they have no interest in the gas estate. Trespass. He mentioned trespass in words that I didn't understand at all. It doesn't plead anything. Trespass is an unauthorized entry interfering with the owner's possession or interest causing some measurable damage. For reasons discussed, Levisa can't satisfy the burden of trespass or justify it here today.

Island Creek is the lessee. It is storing water. Under that lease it cannot be a trespass and for

Reply.A21

these reasons stated, your Honor, particularly the '56 lease, the Island Coal Company and Consolidation contracts and with [p.288] respect to harm to coal and coal-bed methane Levisa cannot show.

I won't get into any detail except to say that our evidence will cover the harm to the public. Levisa cannot demonstrate -- and the injunction is not be entered because when you consider what Cconsolidation's 500 employees and their loss of pay and benefits in the millions that will not be put back into the economy, etc., etc., and the damage to the public.

For those reasons, your Honor, I would ask you to deny the injunction. We haven't had a memorandum and we are sorry to be so long.

* * *

Reply.A22

VIRGINIA:

IN THE CIRCUIT COURT FOR THE
COUNTY OF BUCHANAN

*LEVISA COAL
COMPANY, a Virginia
Limited Partnership and
L.L.P.,*

Plaintiff : Case No.
CL06000408-00

-vs-

*CONSOLIDATION COAL
COMPANY,*

Defendant :

November 16, 2006
9:00 a.m.

HEARD BEFORE:
THE HONORABLE KEARY R. WILLIAMS

* * *

[p.450] BY MR. SEXTON:

Q. Mr. Irvin, I am showing you Plaintiff's Exhibit 1, which purports to be a deed dated December 28th, 1937 from a Mr. Pobst and Mr. Combs to Levisa Coal Corporation. Is this the deed of the coal interest that Levisa Coal Company, the plaintiff in this case, holds today?

A. Yes, it is.

Q. Is Levisa Coal company the successor to Levisa Coal Corporation?

A. Yes, Levisa Coal Corporation is now Levisa Coal Company, a limited partnership and LLP.

Q. Did there come a time when Levisa Coal Company or its predecessor leased this coal to Island Creek Coal?

A. Yes, they leased the below-drainage coal on, not all of the tracts, but some of the tracts, to Island Creek Coal Company.

Q. I am showing you a document that came into evidence yesterday as Plaintiff's Exhibit 2. Is that the coal lease to Island Creek for the below-drainage coal on your Levisa Coal properties?

A. Yes, it appears to be.

Q. Okay. I am going to ask you to turn to [p.451] page 3 of that document, Plaintiff's Exhibit

2. Did Levisa Coal Company or its predecessor reserve certain rights under this document?

MR. ALLEN: I am going to object to the witness testifying about the lease or his understanding of the lease. I think that is for the Court and not for any particular witness to tippy-toe through the document and start interpreting it, because that's your responsibility unless Mr. Sexton is going to say that this agreement is ambiguous and he wants to introduce extrinsic evidence.

I don't think Mr. Irvin was around in 1956 when this lease was prepared. I don't think he can do this. I object to it.

MR. SEXTON: I am not asking for any interpretation, Judge, yet, and I am not planning to. What I was going to do is just ask if this is an exemption and revisions clause and if he is familiar with it.

THE COURT: All right. Go ahead. Objection is overruled.

[p.452] BY MR. SEXTON:

Q. Did Levisa Coal Company or it [sic] predecessor reserve certain rights under this lease?

A. Yes, they did.

Q. Is that reflected on page 3 of the lease?

A. The pages, the lease that I am looking at doesn't have page numbers, but there is a header

Reply.A25

that says, "Exempting and reserve to lessor." And that's --

Q. On the third page of the document?

A. That's correct.

Q. I would like to direct your attention to article 17 of the lease which is, since it is unnumbered you will have to flip through, but it's six pages from the end.

A. Yes.

Q. In the, in this coal lease which Levisa Coal or it [sic] predecessor entered into with Island Creek, did it reserve the right to have to consent to any assignment of the lease?

MR. ALLEN: Well, my objection is when he testifies like that that yes, certain rights were reserved to the lessor, then in a [p.453] way he is interpreting the lease. That is what this question is intended to do. Whatever rights were reserved to lessor, the document is going to speak for itself and Your Honor is going to make those findings.

THE COURT: The lease speaks for itself, obviously. I don't know really what the purpose is. I can't imagine that counsel is offering the witness and asking these questions to interpret the lease to the Court, the Court certainly is going to do that.

MR. SEXTON: Right. We take the position that the lease is unambiguous just as Mr. Allen does. So we are not offering it as extrinsic evidence. As old as

Reply.A26

he is, I don't think Mr. Irvin was there when it was signed, either.

THE COURT: I would be offended if he said that. If you just need to point that out, the Court recognizes that certainly and will examine that article of the lease and make any decision that the Court is called upon to make.

MR. SEXTON: There is a question that [p.454] relates not to the interpretation.

* * *

Reply.A27

[p.623]

THE COURT: Plaintiff rests?

MR. SEXTON: Yes, Your Honor.

(Plaintiff Rests.)

MR. ALLEN: Your Honor, I would like to make a motion. Judge, we are pleased to put [p.624] on our case, we have a lot of people hanging around for two days, but we don't think we should have to for the following reasons.

I am going to combine this under one argument, although the argument of Massie v. Firmstone with respect to Mr. Irvin's testimony, their case can't rise any higher than [sic] his testimony with respect to the facts within his knowledge. He is not an idle person from Levisa. He is the general partner. He has, I think, some authorization, agency agreement to speak for them. And he has done so.

Their case fails, and I will just deal with one narrow point of it, with respect to irreparable harm. If you deal with the other issues, we haven't gotten to showing the harm, but you can get the picture. We have dealt some with likelihood to win, and the public interest. But the threshold issue is irreparable harm. I would like to limit my comments to that.

The testimony is and it is uncontradicted, not just from Mr. Irvin, the [p.625] mine was idled in '98. There is no question about that. There is no question but that it, there, that it needs, that it

Reply.A28

should be reopened now because it is economically feasible. There is no claim that there will be a time in the future when it could be economically feasible to open this mine. And it is a given that coal may never be mined again in VP-3. Not because anybody has done anything wrong and not because there is water there, but because the economic conditions may not allow for VP-3 to be opened again.

And so the whole idea is the damages are not -- the damages, first, are speculative. Second, they are just not irreparable. By virtue of the plaintiff's own testimony, you can calculate the coal reserves that are there. The lease specifically provides that if these reserves should be mined and aren't mined, then royalties are to be paid based on that. There is clearly an adequate remedy at law.

So not only are the damages totally speculative, but they clearly aren't [p.626] irreparable. We really don't have to offer, say anything about the gas estate because they haven't offered any testimony on the gas estate. They have no expert to say there has been any harm to the gas estate at all. But even if there is, the evidence is clear that what the plaintiff is entitled to is royalties only, which are clearly money damages.

So Your Honor, they fail the threshold standard and the threshold standard has a number of words for short definition, and as you can see they fail them all. "Imminent, irreparable harm," nothing is imminent. As far as being irreparable harm, it is

Reply.A29

not, which is neither speculative, it is speculative, nor compensable in money damages. And clearly it is compensable money damages.

Mr. Irvin's testimony, I think, said it all, but the additional evidence they offered, which was by Mr. Ramsey and their two experts, just didn't help their case at all. They have clearly not begun to carry their burden of proof to get a temporary injunction.

THE COURT: Mr. Sexton.

* * *

[p.650]

MR. ALLEN: May I reply? Saying something over and over again doesn't mean it [p.651] is so, it doesn't get any better. I am not going to comment on a lot of the things he says, it is like a closing argument. My position was pretty narrow. Mr. Street never addressed it.

Let me just sort of state what it is. First, the standard is irreparable harm. He never wanted to use the word "irreparable harm" because that happens to be the standard in a temporary injunction hearing. He hasn't proved it. To his credit, he didn't even argue, he didn't even bother to do that.

He cited you a lot of cases. But he said something that is really bothersome. He is telling you actually that the State of Virginia has not adopted the Black letter decision. I will tell you that is crazy. Of course they have. I don't think anybody would stand up here and say they haven't. The only thing that has not happened is the Virginia Supreme Court has not expressly said, "We adopt this."

What we have is 25 to 50 Circuit Court decisions all over the place. When it goes up [p.652] to the Virginia Supreme Court in piecemeal fashion it has adopted every one of these. I am not going to repeat the four factors to you. It is not credible for anybody to say that Virginia hasn't adopted that because they have. And irreparable harm is the keynote of it.

Reply.A31

They haven't even come close to showing irreparable harm.

The cases he cited you, I am not going to deny that injunctions are issued in cases of trespass and easement and all that. They are permanent injunctions. He stood up here and cited cases that don't deal with temporary injunction, but instead a permanent injunction.

At the end of this case, when all of the evidence is in, we don't think you will conclude this. But you could well have the power because irreparable harm is not the standard. It is any harm at all, even if it is compensable in damages. We think you will have the power then to end the injunction.

Judge, I am not going to go through this lease the way he did. What I am going to tell [p.653] you is when you read the paragraph that he went over, the paragraph that talks about dumping water, you will see how in his structure, and you will see it starts "Together with," and then it gives you the surface rights. Then you will come down and there is a semicolon. It says "Together with," and then it spells out other rights. Then it comes down and there is another semicolon. It says "Together with," this is where it talks about the right to dump water and the right to use the property for other purposes.

So the idea that this is all one big sentence that deals just with surface rights, we would disagree with that. We think when you read it you will see

three separate clauses, the last of which should not and cannot be connected to surface rights.

And Your Honor, I want to point out one other thing in this lease because I believe that on its face it puts this lessee, Island Creek, on a literal parody with the lessor, Levisa. It is on, pages are not numbered, but [p.654] I think it is on page 4. You can listen to what it says, very simple sentence. First, it makes the reservation of certain rights to the lessor. And then it says quote -- could I wait for you to find that, Your Honor? Plaintiff's Exhibit 2.

THE COURT: What page?

MR. ALLEN: This would be the fourth page, Your Honor. Reference was made to the second page because I wanted to point out -- I don't think that it's necessary to go through this -- but this idea that that entire paragraph deals just with surface rights, I don't know what is the basis for saying that. Those clauses are separated by semicolons, not by commas. That second phrase starts with, the first one on surface rights, "Together with," and then it deals with surface rights.

Then one starts and says "Together with excavations," and "dumping water." And then you come down and there is a semicolon and it says, "And generally," semicolon, "And generally to make," listen to what it says, "any use of the leased premises."

[p.655] Well, these premises is not just the surface. Leased premises is everything. That is

what it says. And if it had meant surface it could have said that. If it meant to -- here is another point Mr. Sexton emphasized. He said, "This is only for mining. Island Creek can only use this for mining." It says, "Mining or other operations." Yeah.

And one tenant of contract construction, you have to read the whole contract. You can't pick out words or phrases that you like. I am not going to do that and no one should. It is incumbent on you to read the whole contract. But I want to refer you over to page 4. Pretty simple phrase. It is at the end of the first paragraph. This is after the lessor has reserved for himself some rights. Listen to this, quote, "Any and all such rights and privileges hereby accepted and reserved shall inure to the benefit of, and may be exercised by lessor and his successors or assigns, and by any and all other persons, firms or corporations which may in any way claim by, through or under lessor."

[p.656] Well, guess who is one of those people, Your Honor? We are. And so essentially the lessee here has been granted the co-extensive rights with the lessor. And from a lessee standpoint, that is exactly what you want to do. You want to be able to have complete use of the property.

Now, Mr. Sexton wants to stands [sic] up here and act like he was around in 1956. I wasn't, or he wasn't. It was a great time, I was 16 years old, and those were the best of times. But nobody is going to

Reply.A34

be around that knows anything about this lease in terms of the facts and circumstances there.

I would suggest to you that the lessee's rights to this lease are extremely broad. I don't really see how they could be any broader. And importantly, the rights are not prohibitive. There is nothing in this lease to prohibit Island Creek from dumping water; from dumping water, from storing water, from putting the premises to any other proper and legitimate use.

I am not going to stand here and tell [p.657] you as Mr. Street did that we can do anything with it. Of course we can't. I think when waste and destruction become involved, then that becomes an issue. I wish I had answers for you on that issue. I am not prepared to answer those today because the standard is irreparable harm. They haven't even begun to show that.

In addition, the parts of the provision of the lease that he wants to run away from are royalty provisions. The lease makes it very clear that if Island Creek doesn't mine the coal that should be mined or because of its actions there is loss or threatened coal, then calculations can be made and damages can be paid. Again, not irreparable damages.

He said the things, that coal expert stood up here and told you about the harm and everything. There wasn't a single word out of the mouth of that coal

Reply.A35

expert that indicated that any harm was irreparable. That is the basis for our motion.

Before I sit down, I just want to mention Island Creek. Our witnesses have not [p.658] testified. Mr. Street has tried to create the impression that Island Creek is a phantom. Island Creek is not a phantom. Island Creek is a real, live, well and healthy company. It just so happens that it had mining operations here until April of 2006, as Mr. Ramsey testified to. When it ceased those mining operations it doesn't have any employees in this area. The important thing about Island Creek is it is a real company and when it comes around to it we will prove that to you.

It has rights and assets. One of those rights is the right to use VP. What it has done is it has contracted with Consolidation to allow Consolidation to store excess water in the idle mines. You know, Your Honor, that is a perfectly legitimate thing to do. When we have a chance to prove our case we will get away from, I guess the aura that Mr. Sexton tried to put over Island Creek and demonstrated, but for right now there has been no showing of irreparable harm. That is the threshold, the first requirement. For that reason the plaintiff's, the motion should be [p.659] denied.

* * *